

Before the
UNITED STATES
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

DETERMINATION OF RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(PHONORECORDS III)

Docket No. 16-CRB-0003-PR (2018-2022)
(Remand)

**COPYRIGHT OWNERS' EXPEDITED MOTION FOR
EXTENSION OF DEADLINE TO FILE WRITTEN REPLY SUBMISSIONS**

National Music Publishers' Association and Nashville Songwriters Association International (together, "Copyright Owners") respectfully submit this motion pursuant to 17 U.S.C. § 801(c) for an order extending the deadline by which participants must file their written reply briefs and rebuttal evidence (and produce documents relied upon in connection with such submissions), as set forth in the December 23, 2020 Order (eCRB No. 23413 at 2) (the "December 23 Order"), to a date that is the later of three weeks after the pending motions in this remand proceeding are decided or three weeks after participants receive any ordered productions of documents pursuant thereto. Given the significant time constraints at issue, where participants' written reply submissions are due on July 2, 2021, yet oppositions on this Motion are due thereafter under 37 C.F.R. § 303.6(f), Copyright Owners respectfully request that the Judges adjust the schedule in this proceeding *sua sponte* pursuant to their authority under 17 U.S.C. § 801(c). *See also In re Web V*, Docket No. 19-CRB-0005-WR (2021-2025), eCRB No. 20469 at 1-2 (issuing aspects of scheduling order *sua sponte* "[i]n recognition of the time constraints s identified . . . by the Participants").¹

Currently, there are two motions pending in this proceeding. The first is Copyright Owners' motion to compel the Services to produce certain documents and information related to their Joint Written Direct Remand Submission and requested by Copyright Owners in their First Sets of Requests for Production of Documents and First Set of Interrogatories (the "Motion to Compel," eCRB No. 23896), which was filed with opposition and reply papers on May 6, 2021. The Motion to Compel generally seeks information concerning (i) revenues, costs and royalty payments; (ii) information concerning royalty pool calculations (including subscriber counts); (iii)

¹ On June 22, 2021, Copyright Owners informed Amazon, Google, Pandora, and Spotify (the "Services"), and George Johnson of Copyright Owners' intent to file this Motion, and sought confirmation on whether each of the Services wished to join, consent or object thereto. Amazon responded that "the Services object to [the] motion in full and will file a written opposition to it," and Mr. Johnson indicated that he joins Copyright Owners in this Motion.

bargaining power as between the Services and record companies; and (iv) the impact of the rate structure adopted in the final determination in this proceeding published at 84 Fed. Reg. 1918.

The second pending motion is the Services' unopposed motion for participants to receive full access to and use of the restricted version of the Judges' Initial Determination in *Webcasting V* on an outside counsel only basis, which was filed on June 18, 2021. (eCRB No. 25338.)

The participants' positions on the centrality of the documents sought by the pending motions to this proceeding are set forth in the respective briefs. (See eCRB Nos. 23896 and 25338.)

The Copyright Owners' timely motion to compel has not been determined but discovery closes in the remand proceeding this Friday, June 25, 2021, and the reply submissions are due one week thereafter, on July 2, 2021. At this point, even were Copyright Owners' motion to be granted in whole or in part, it would not provide them adequate time to evaluate and incorporate any information provided into their reply submission.² Denying Copyright Owners additional time to review and incorporate into their reply submission any information requested in the Motion to Compel that the Board subsequently orders the Services to produce would therefore render that relief ineffective, and will prejudice Copyright Owners' ability to fully document the flaws in the Services' remand arguments. See e.g., *Wendler & Ezra, P.C. v. Am. Int'l Grp., Inc.*, 521 F.3d 790, 792 (7th Cir. 2008) (vacating trial court's judgment in favor of defendant because it failed to rule on plaintiff's motion to compel); *Clark v. Cap. Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1178-79 (9th Cir. 2006) (trial court's decision to rule on summary judgment motions prior to ruling on pending motion to compel was reversible error); *In re Distribution of Cable Royalty Funds*, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13), eCRB No. 3545 at 14 (proposed

² Copyright Owners previously raised the issue of timing on the discovery order in an email to the Board on June 3, 2021, and again in a formal letter on June 14, 2021. (eCRB No. 25336.) As indicated *supra*, under the timetable of this proceeding, and the time period allowed for briefing a motion, a *sua sponte* order is the only practical way to resolve this issue prior to the July 2 reply deadline.

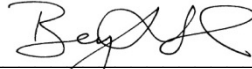
changes to expert witness's testimony two weeks before scheduled start of hearing prejudicial to other parties).

The Copyright Owners' inability to review and address in their reply submission any findings by the Board in *Web V* that are relevant to the remanded issues in this case will also result in inefficiencies. And, even if the parties were granted the right to provide supplemental briefing after July 2, 2021 to address information requested in the pending motions that is produced pursuant to an order issued after this Motion, it would be unnecessarily inefficient, creating an additional layer of briefing and would be wasteful of the Judges' time. *See* 37 C.F.R. § 303.8 (concerning the Judges' promotion of "efficient and just administrative proceedings"). Such inefficiencies and imposition on the time of the Judges can be avoided by extending the reply filing deadline to a reasonable time (three weeks is proposed) to enable the participants to evaluate any information that is made available and then incorporate such information, if appropriate, in the reply submissions, alongside other arguments in the first instance.

With the discovery deadline and reply submission deadline looming, Copyright Owners respectfully request that the Judges expeditiously rule that the deadline for the parties to file written reply briefs and rebuttal evidence (and produce documents relied upon in connection with such submissions) be extended to a date that is the later of three weeks after the pending motions have been decided by the Judges or three weeks after Copyright Owners receive any productions ordered pursuant to the rulings on those motions, to allow participants to incorporate the information therein into those reply submissions. A Proposed Order is attached.

Dated: June 23, 2021

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Proof of Delivery

I hereby certify that on Wednesday, June 23, 2021, I provided a true and correct copy of the Copyright Owners' Expedited Motion for Extension of Deadline to File Written Reply Submissions to the following:

Nashville Songwriters Association International, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Google LLC, represented by David P Mattern, served via ESERVICE at dmattern@kslaw.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Amazon.com Services LLC, represented by Scott Angstreich, served via ESERVICE at sangstreich@kellogghansen.com

Spotify USA Inc., represented by Richard M Assmus, served via ESERVICE at rassmus@mayerbrown.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Signed: /s/ Benjamin K Semel